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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 589

A. MAGNANO COMPANY, APPELLANT,

vs.

G. W. HAMILTON, AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED NOVEMBER 15, 1933

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INDEX

	Original.	Print
Record from D. C. U. S., Western Washington	2	1
Amended bill of complaint	2	1
Exhibit "A"—Act relating to revenue and taxation, etc.—butter substitutes	15	10
Application for interlocutory injunction	19	14
Notice of application for injunction	21	15
Answer	23	16
Order convening statutory three-judge court	31	22
Notice of hearing	33	23
Opinion, Neterer, J., on motion to dismiss, etc.	36	25
Stipulation of facts	43	29
Statement of evidence	53	36
Caption	53	36
Testimony of John A. McGregor	54	37
Dr. Herbert Prior	55	38
Julius A. Hall	56	39
Colloquy	56	39
Stipulation as to statement of evidence	58	40
Order approving statement of evidence	59	41

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 23, 1934.

been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is a wholly original and independent product sui generis.

IX

That, pursuant to federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon in letters three-fourths of an inch high the word "Oleomargarine"; that each individual one-pound print contained in said original package is packed in a carton which has printed or branded on the two principal panels thereof the word "Oleomargarine" in plain, Gothic letters of not less than twenty-point type, which [fol. 6] letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing that the said product is anything other than oleomargarine; that all purchasers of said product are at all times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the State of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

X

That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for butter, but was sold as a wholly original and independent product sui generis; and that since the passage of the said act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargine only as a wholly original and independent product sui generis.

XI

That for many years last past and continuously up to effective date of said act the average annual sales of oleomargaring in the State of Washington have exceeded

5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the State of Washington, and approximately 3,700,000 pounds were shipped into the State of Washington from other states in the United States of America. That all oleo- [fol. 7] margarine that has been sold by any persons, firms and corporations whomsoever in the State of Washington for many years last past and up to March 9th, 1931, has had the characteristics and been sold under the conditions described in paragraph VIII, IX and X of this complaint. That said oleomargarine of complainant and all other oleomargine sold in the State of Washington at all times up to the passage of said act was sold in direct competition with dairy butter produced in the State of Washington; that thousands of persons of moderate means in the State of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargine; that the total production of dairy butter in the State of Washington during the year 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to the present time the production of butter in the State of Washington has been at approximately the same rate per annum; that at the time of the passage of said act the wholesale price of oleomargarine in the State of Washington was twenty cents a pound and the wholesale price of dairy butter in the State of Washington was twenty-nine cents a pound; that at the time of the passage of said act the retail price of said oleomargarine in the State of Washington was twenty-five cents a pound, and the retail price of butter in the State of Washington was from thirty-two to thirty-four cents a pound; that at the time of the filing of this amended bill the wholesale and retail prices of oleomargarine and butter in the State of Washington are approximately the same as they were at the time of the passage of said act, and have been approximately the same throughout the entire period since the passage of the act and up to the present time.

[fol. 8] XII

That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within, the State of Washington of said product; and had and still has,

within the said state, a large amount of property devoted to said business; that the business of the complainant in the State of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9th, 1931, had a regularly established business in which it imported from the State of California and sold in the State of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and that the annual net profits of said business in the said state during said period exceeded the sum of $20,000.00 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9th, 1931, said importation and sales of oleomargarine by the complainant in the State of Washington were as follows:

Year	Pounds Sold
1929	2,522,762
1930	2,116,056
1931 up to March 9	475,815

That since March 9th, 1931, complainant, by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same, as hereinafter alleged, has not imported from the State of California and sold, and has [fol. 9] not been able to sell, any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said act produced, refined, manufacturted or compounded and thereafter sold such oleomargarine in the State of Washington for use and sale in the State of Washington, or imported into or sold in the State of Washington any such oleomargarine.

XIII

That upon the effective date of said act, viz., March 9th, 1931, and at all times since, the business of manufacturing and selling oleomargarine within the State of Washington, and the business of importing into and selling olemargarine within the State of Washington, has been wholly and completely destroyed; and at all times since the effective date

of said act no revenue whatsoever has been collected by the State of Washington under the provisions of said act, and that since said date no sales subject to tax under said act have been or could be made. That since the effective date of said act no applications have been made to the Collector of Internal Revenue of the United States in the State of Washington for wholesale or retail licenses under the federal statutes to sell oleomargarine in the State of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the State of Washington under said federal statutes since said date; nor has the Government of the United States of America derived any revenue from the sale of oleomargarine within the State of Washington since said date.

XIV

That for a long time prior to and up to the time said act imposing a tax of fifteen cents per pound became effective, [fol. 10] your complainant imported into the State of Washington said Nucoa at a cost of seventeen cents per pound, and sold said product to retail dealers in the State of Washington at twenty cents per pound, who, in turn sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said act the price per pound at which your complainant could import said product and, if not taxed under said act, could sell the same to retail dealers, and the price per pound at which retail dealers in the State of Washington could resell to the general public, has remained the same, and at certain times during said period would have been two cents per pound less to each your complainant, the retail dealers and the consuming general public. That the allegations of fact contained in this paragraph with reference to complainant's business apply without substantial variations to all other persons, firms, and corporations engaged in manufacturing, importing and/or selling oleomargarine within the State of Washington.

XV

That the defendants have at all times since the effective date of said act threatened and still threaten to enforce against your complaint and/or others similarly situated a tax of fifteen cents per pound on all said oleomargarine

sold by the complainant and/or others similarly situated in the State of Washington. That if a tax of fifteen cents per pound is imposed upon said oleomargarine, all trade and commerce therein in the State of Washington of complainant and/or all others similarly situated are and will continue to be prohibited and completely destroyed, inasmuch as the addition of said tax to the market price of said commodity will make it necessary, if complainant is to make [fol. 11] any profit on said sales, to sell said oleomargarine at a price substantially in excess of the price of said dairy butter which may be purchased by the consumer to satisfy the needs otherwise satisfied and fulfilled by said oleomargarine.

XVI

That the threatened enforcement of said act against your complainant has completely destroyed and continues the complete destruction of all business of complainant in the State of Washington in the sale of said oleomargarine, and the business of all others falling within the scope of said act; that, in addition thereto, said threatened enforcement deprives hundreds of regular and prospective customers of the complainant of their liberty to purchase said product in the State of Washington.

XVII

Complainant alleges that the sales of said Nucoa by complainant in the State of Washington are not taxable under said Chapter 23 of the Laws of 1931, because said act is unconstitutional and void, but that the defendants state that it is their intention to enforce said Chapter 23 of the Laws of 1931 against all sales of oleomargarine that may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

XVIII

That said act of the State of Washington is unconstitutional and void:

(a) For the reason that the said act violates the Constitution of the United States and the amendments thereto, in that the threatened enforcement thereof does and will deprive the complainant of its property without due process

[fol. 12] of law, and does and will deny to it the equal protection of the laws, in violation of Article XIV of the Amendments to the Constitution of the United States;

(b) For the further reason that, in violation of the above mentioned Article XIV of the Amendments to the Constitution of the United States, said act deprives hundreds of prospective customers of complainant of their liberty in freely purchasing or entering into contracts to purchase said food product for their own consumption;

(c) For the further reason that taxes under the Fourteenth Amendment may only be levied for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into and sale within the State of Washington of olemargarine in aid of the dairy industry, a private business;

(d) For the further reason that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state, all in violation of Paragraph 3 of Section 8 of Article I of the Constitution of the United States;

(e) For the further reason that said act violates Article I, Section 8 of the Constitution of the United States in that said act interferes with the power of Congress to levy and collect taxes, duties, imposts, and excises.

XIX

That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and join in the expense of this proceeding.

[fol. 13]

XX

That the complainant has no adequate remedy at law. That unless equitable relief by injunction, interlocutory and permanent, is granted by this court, complainant will be deprived of its constitutional rights as hereinbefore alleged; that the loss of business and property resulting from said enforcement of said enactment is so great and

irreparable and the penalties provided by said statute are so severe and would lead to such a multiplicity of suits and prosecutions that complainant has no adequate remedy except in a court of equity.

Wherefore, complainant prays the order and decree of this court as follows:

1. That an injunction, interlocutory and permanent, issue out of this court restraining the defendants, and each of them, and their employes, agents and representatives, from enforcing said act against your complainant, and that said act be held to have been misconstrued as applied to your complainant, and, if properly so construed, to be unconstitutional and void.

2. That complainant recover its costs and disbursements from the defendants, and have such other and further relief as to the court may seem meet and equitable.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Complainant, Office and Post Office Address: 650 Colman Building, Seattle, King County, Washington.

Receipt of copy hereof duly acknowledged and consent to the filing of this amended bill of complaint hereby given this 18 day of Sept., 1931.

John H. Dunbar, Asst. Atty. Gen., Attorneys for Defendant.

[fol. 14] *Duly sworn to by John A. McGregor. Jurat omitted in printing.*

[fol. 15] EXHIBIT "A" TO AMENDED BILL OF COMPLAINT

CHAPTER 23. EXCISE TAX ON SALE OF BUTTER SUBSTITUTES

An Act relating to revenue and taxation, requiring distributors as therein defined to pay an excise tax on the sale of all butter substitutes, providing for licensing dealers therein, fixing a penalty for a violation of the provisions of the act, and declaring that this act shall take effect immediately.

Be it enacted by the Legislature of the State of Washington:

Section 1. (a) The term "butter substitute" whenever used in this act shall be held and construed to mean and include any compound or compounds of animal or vegetable fats, such as tallow, beef fat, suet, lard, lard oil, suine, lardine, intestinal fat, offal fat, cocoanut oil, olive oil, cottonseed oil, peanut oil, in combination with milk, butter or any product of milk or butter, either colored or uncolored, that does not contain eighty per cent (80%) of milk or butter fat, and is sold or used as a substitute for butter.

(b) The term "distributor" whenever used in this act shall be held and construed to mean and include any person, firm or corporation which produces, refines, manufactures or compounds and thereafter sells such butter substitute in the state of Washington for use and sale in this state, or who imports and sells such butter substitute into this state, except as hereinafter provided.

Sec. 2. That in addition to the taxes now provided for by law each and every distributor, as defined in this act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of representatives or agents in this state, in the sale of butter substitutes as herein defined, shall not later than the fifteenth day of each calendar month render a sworn statement to the director of agriculture of the state of Washington of all such butter subsitute sold by him or them in the state of Washington during the preceding calendar month, and pay an excise tax of fifteen cents per pound on all butter substitutes so sold as shown by such statement in the manner and within the time hereinafter provided.

[fol. 16] Sec. 3. All distributors of such butter substitutes in the state of Washington shall file a duly acknowledged certificate with the director of agriculture on forms prescribed, prepared and furnished by him, which shall contain the name under which such distributor is transacting business within the state of Washington; such certificate shall state the place or places of business and location of distributing stations of the distributor in the state of Washington, the name and address of the manufacturing agent, the names and addresses of the several persons constituting the firm or partnership, and if a corporation the corporate name under which it is authorized to transact

business, and the names and addresses of its principal officers, resident general manager and attorney in fact. If such distributor is an association of persons, firm, partnership or corporation organized under the laws of no other state, territory or nation, if it has not already done so, it must first comply with the laws of the state of Washington relating to the transaction of its appropriate business therein. No distributor, as herein defined, shall, after the law goes into effect, sell any butter substitute until such certificate is furnished, as required by this act.

Sec. 4. Every distributor of such butter substitute shall render to the director of agriculture of the state of Washington, on or before the fifteenth day of each month, on form prescribed, prepared and furnished by said director, a sworn statement of the number of pounds of butter substitute sold by it, him or them during the preceding calendar month, which statement shall be sworn to by one of the principal officers in case of a domestic corporation, or by the resident general manager or attorney in fact in case of a foreign corporation, or by the managing agent or owner in case of a firm or association, and shall contain a statement of the quantities in pounds of butter substitute sold. Bills shall be rendered to dealers in butter substitutes as herein defined. Said bills shall contain a statement printed thereon in a conspicuous place that the distributor of such butter substitute has assumed the liability to the state for the license tax therein imposed and that he, it or they will pay said license tax on or before the fifteenth day of the following month.

Sec. 5. Said excise tax shall be paid on or before the fifteenth day of each month to the director of agriculture of the state of Washington, who shall receipt the distributor therefor and place the same in the state treasury to the credit of the general fund of the state of Washington.

Sec. 6. Every distributor of such butter substitute shall keep a record of such forms as may be prescribed by the director of agriculture of all purchases, receipts, sales and [fol. 17] distributions of such butter substitutes, and such record shall at all times during the business hours of the day be subject to inspection and examination by the director of agriculture, or his deputies, or such other officers as may be provided by law.

SEC. 7. All butter substitutes sold in containers, packages or cases shall bear a stamp or tag showing the date of its issue upon which the same was delivered, the name of the distributor of such butter substitutes, and shall contain in a statement that the liability for the license tax thereon has been assumed by such distributor.

SEC. 8. It shall be unlawful for any person, firm or corporation dealing in butter substitutes to receive or accept any delivery or shipment of butter substitutes from any distributor or to pay for the same, or to sell or offer the same for sale, unless the statement provided for in section seven (7) appears upon the container and upon all invoices for such butter substitutes. If any shipment of butter substitutes is received by any person, firm or corporation from any distributor, or is sold or offered for sale by him or them, upon which the requirements of sections 6 and 7 of this act are not complied with, such person, firm or corporation shall be deemed guilty of a misdemeanor: Provided, That the provisions of this section shall not apply to the receipt or sale of butter substitutes which are exempt from state tax under the constitution and laws of the United States.

SEC. 9. The director of agriculture shall have the power and it shall be his duty from time to time, to adopt, publish and enforce rules and regulations not inconsistent herewith for the purpose of carrying out the provisions of this act.

SEC. 10. Said excise tax shall not be imposed on butter substitutes when sold for exportation from the state of Washington to any other state, territory or nation: Provided, however, The distributor or exporting agent shall make a statement each month to the director of agriculture showing the amount of butter substitute exported.

SEC. 11. If any person shall oppose such butter substitutes in such form and under such circumstances as shall preclude the collection of this tax from the distributor by reason of the provisions of the constitution and laws of the United States, and shall thereafter sell such butter substitute in such manner and under such circumstances as may subject such sale to the taxing power of the state, such person shall be considered a distributor and shall make the

agents and representatives, from enforcing against said complainant Chapter 23 of the Laws of 1931 of the State of Washington, pursuant to the allegations of the verified amended bill of complaint on file in the above entitled cause.

There is served upon each of you herewith a copy of the amended bill of complaint in said cause, the application [fol. 22] for said interlocutory injunction, which application contains a request to the District Court of the United States for the Western District of Washington to convoke a three-judge court for the hearing of said application for an interlocutory injunction, as provided by said Section 266 of the Judicial Code, on a date hereafter to be fixed by said District Court.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Complainant, Office and Post Office Address: 660 Colman Building, Seattle, King County, Washington.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED BILL OF COMPLAINT—Filed Sept. 24, 1931

The joint and several answers of John H. Dunbar, Erle J. Barnes and Roland H. Hartley to the amended bill of complaint:

Come now the defendants and each of them, and say for answer thereto:

I

For answer in lieu of motion to dismiss the amended bill of complaint, the defendants say that said amended bill of complaint does not state facts sufficient to entitle plaintiff to any relief against these defendants and that said amended bill of complaint is wholly wanting in equity.

For a further answer to the amended bill of complaint, the defendants say:

I

Answering paragraphs I, II, III, IV, VI, VII and IX of said amended bill of complaint, defendants admit the allegations therein contained.

[fol. 24] II

Answering paragraphs V and XVI of said amended bill of complaint, defendants deny each and every allegation, matter and thing therein contained.

III

Answering paragraphs VIII and XII of said amended of complaint, defendants are without knowledge sufficient to form a belief concerning the allegations therein contained, and therefore deny the same.

IV

Answering paragraph X of said amended bill of complaint, defendants admit that plaintiff's product was not sold or advertised as or for butter and that it was sold as a wholly original and independent product prior to the passage of chapter 23, Laws of 1931.

As to the remainder of the allegations in said paragraph contained, defendants are without knowledge sufficient to form a belief thereof and therefore deny the same.

V

Answering paragraph XI of said amended bill of complaint, defendants admit that the average annual sales of oleomargarine in the state of Washington for many years last past have exceeded 5,000,000 pounds; that said oleomargarine was sold in direct competition with dairy butter produced in the state of Washington; that thousands of persons of moderate means in the state purchased said oleomargarine because of its lower cost, and that the total production of dairy butter in the state during 1931 was approximately 33,000,000 pounds.

They deny that at the time of the filing of this amended bill the wholesale and retail prices of butter in the state

Washington are the same as they were at the time of the [fol. 25] passage of said act and that they have been the same throughout the entire period since the passage of the act to the present time.

As to the remainder of the allegations in said paragraph contained, defendants are without knowledge sufficient to form a belief thereof and therefore deny the same.

VI

Answering paragraph XIII of said amended bill of complaint, defendants admit that at all times since the effective date of said act no revenue has been collected by the state of Washington under the provisions of said act.

They deny the allegation that since said date no sales subject to tax under said act could be made.

As to the remainder of the allegations in said paragraph contained, defendants are without knowledge sufficient to form a belief thereof, and therefore deny the same.

VII

Answering paragraph XIV of said amended bill of complaint, defendants are without knowledge sufficient to form a belief concerning the allegations contained in the first sentence thereof, and therefore deny the same.

As to the allegations contained in the last sentence thereof, defendants deny the same.

VIII

Answering paragraph XV of said amended bill of complaint, defendants admit that they have since the effective date of said act threatened and that they still threaten to enforce against complainant and others similarly situated the tax of 15 cents per pound on all oleomargarine sold by complainant in the state of Washington.

As to the remainder of the allegations in said paragraph contained, defendants deny the same.

[fol. 26] IX

Answering paragraph XVII of said amended bill of complaint, defendants admit that they state it is their intention to enforce chapter 23 against all sales of oleomar-

garine that may be made by complainant and all others similarly situated.

As to the remander of the allegations in said paragraph contained, defendants deny the same.

X

Answering paragraph XVIII of said amended bill of complaint, defendants

(1) Deny that said act deprives complainant of its property without due process of law or denies to it equal protection of the law in violation of the Fourteenth Amendment.

(2) Deny that said act deprives prospective customers or any one of their liberty freely to purchase or contract to purchase said food product for their own consumption.

(3) Deny that the taxes imposed by said act are not for a public purpose and that the purpose of the act is to prohibit the manufacture, importation or sale of oleomargarine in aid of the dairy industry.

(4) Deny that said act imposes an unjust or discriminatory burden upon complainant in respect to the carrying on of its interstate commerce in violation of paragraph 3, section 8, article I of the Federal Constitution.

(5) Deny that said act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises in violation of section 8, article I of the Federal Constitution.

For a further answer to the amended bill of complaint, the defendants say:

[fol. 27]

I

That dairying is the basic industry of the state of Washington; that the state comprises 66,811 square miles of land upon which there are 40,800 dairy farms comprising in excess of 250,000 acres of improved farm land besides innumerable lesser farms devoted partially to the production of butter and other dairy products.

II

That according to the official report of the state department of agriculture for the calendar year 1930 there were

in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,794,384,000	pounds
Creamery butter	32,925,707	pounds
Ice-cream	3,598,466	gallons
Cheese	8,264,332	pounds
Evaporated and condensed milk	54,545,568	pounds
Value of by-products, condensed and powdered, skim milk, buttermilk and casein	$1,514,000.00	

III

That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,463	pounds
Creamery butter	29,804,070	pounds
Ice-cream	5,425,523	gallons
Cheese	6,788,283	pounds
Evaporated and condensed milk	41,610,900	pounds
Value of by-products, condensed and powdered skim-milk, buttermilk and casein	$3,203,086.85	

IV

That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties; that said farm lands, equipment and properties of every kind are at the present time and for many years have been [fol. 28] contributing heavily to the support of the state government and its various political subdivisions while this complainant and all such other dealers in oleomargarine and other butter substitutes have escaped paying their proportionately just share of the tax burden; that chapter 23, Laws of 1931, was enacted for the purpose only of attempting to equalize to some extent the tax burden as between the dairy farmer and the dealer in oleomargarine and so-called butter substitutes; that there is a sufficient difference between butter and oleomargarine to justify the legislature in placing the latter in a single class for the purpose of imposing an excise upon its sale; that oleomargarine and butter are composed of entirely different elements; that the principal element of butter is butter fat produced by cows for which the market price at the present time is 28 cents a pound while oleomargarine consists basically of vegetable oil at a cost of 8 cents a pound and skim milk at the

ratio of 400 pounds thereof to 1,000 pounds of manufactured oleomargarine at a cost of 30 cents a hundredweight; that oleomargarine is produced at a cost of from 35 to 55 per cent of the cost of butter, and that notwithstanding this disparity between the cost of production and the enormous quantities of oleomargarine which were sold in the state prior to the enactment of chapter 23, Laws of 1931, such product contributed very little to the cost of government in the way of taxation.

V

Defendants verily believe and therefore aver it to be the fact that said chapter 23, Laws of 1931, was not intended to prohibit the business of dealing — oleomargarine and butter subsfitutes but was intended strictly and exclusively as a revenue measure; that one reason no taxable sales of such products have been made since the law was en- [fol. 29] acted is that due to economic conditions the price of butter has been so low as to discourage the use by consumers of oleomargarine and butter substitutes; that the retail price of butter at the present time is 28 cents per pound as against an average over the past five years of 38 cents per pound; that a second reason no taxable sales of such products have been made since the law was enacted is that dealers therein have anticipated a contest of the validity of such law and have made no active attempt to sell their products subject to the tax but have preferred to await the final outcome of such contest.

Wherefore, defendants pray that the amended bill of complaint be dismissed and that they be awarded their necessary costs and disbursements.

John H. Dunbar, Attorney General of the State of Washington; E. W. Anderson, Assistant Attorney General of the State of Washington, Temple of Justice, Olympia, Washington, Solicitors for Defendants. John B. Fogarty, Everett, Washington; Philip D. MacBride, Seattle, Washington, of Counsel.

[fol. 30] *Duly sworn to by Erle J. Barnes. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 31] In United States District Court

[Title omitted]

Order Convening Statutory Three-Judge Court—Filed Dec. 24, 1931

The above entitled matter came on before the undersigned judge of the District Court for the Western District of Washington, Southern Division, upon complainant's presentation of an application for an interlocutory injunction, pursuant to Section 266 of the Judicial Code of the United States, as amended by the Act of February 13, 1925; and, it appearing to the Court that the complainant by its verified amended bill of complaint presents a case requiring the undersigned district judge immediately to call to his assistance to hear and determine the application two other judges, one of whom shall be a Justice of the Supreme Court, or a Circuit Judge; now, therefore, it is hereby ordered, as follows:

1. The undersigned hereby calls to his assistance to hear and determine the said application for an interlocutory injunction, the Honorable Curtis D. Wilbur, United States Circuit Judge for the Ninth Circuit, and the Honorable Jeremiah Neterer, United States District Judge for the Western District of Washington.

2. That the said defendants appear and show cause, if any they have, on the 30th day of December, 1931, at 10 o'clock in the forenoon at the court room in Tacoma, why [fol. 32] an interlocutory injunction should not issue as prayed for in said amended bill of complaint.

The clerk is directed to mail a copy of this order to Judges Wilbur and Neterer.

Done at Tacoma, Washington, this 24th day of December, 1931.

Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.

[File endorsement omitted.]

[fol. 33] In United States District Court

[Title omitted]

Notice of Hearing—Filed Dec. 30, 1931.

To the Honorable John H. Dunbar, as Attorney General of the State of Washington, the Honorable Erle J. Barnes, as Director of Agriculture of the State of Washington, and the Honorable Roland H. Hartley, as Governor of the State of Washington:

You and each of you are hereby given notice, pursuant to the provisions of Section 266 of the Judicial Code of the United States, as amended, that the District Court of the United States for the Western District of Washington, Southern Division, has set for hearing and determination, in the Federal Court Room in the Federal Building in the City of Tacoma, State of Washington, on the 30th day of December, 1931, at ten o'clock in the forenoon of said day, the application for an interlocutory injunction in the suit brought by A. Magnano Company against John H. Dunbar, as Attorney General of the State of Washington, Erle J. Barnes, as Director of Agriculture of the State of Washington, and Roland H. Hartley, as Governor of the State of Washington, being Cause No. 458 in equity, to enjoin the enforcement of Chapter 23 of the Laws of 1931 of the State of Washington, relating to an alleged excise tax on butter-substitutes, by enjoining the acts and threatened [fol. 34] act of the said named defendants in enforcing the provisions of said act, upon the ground that the said statute violates the Constitution of the United States in the following manner:

(a) For the reason that the said act violates the Constitution of the United States and the amendments thereto, in that the threatened enforcement thereof does and will deprive the complainant of its property without due process of law, and does and will deny to it the equal protection of the laws, in violation of Article XIV of the Amendments to the Constitution of the United States;

(b) For the further reason that, in violation of the above mentioned Article XIV of the Amendments to the Constitution of the United States, said act deprives hundreds of

prospective customers of complainant of their liberty in freely purchasing or entering into contracts to purchase said food product for their own consumption;

(c) For the further reason that taxes under the Fourteenth Amendment may only be levied for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into and sale within the State of Washington of oleomargarine in aid of the dairy industry, a private business;

(d) For the further reason that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state, all in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States;

(e) For the further reason that said act violates Article I, Section 8 of the Constitution of the United States in that [fol. 35] said act interferes with the power of Congress to levy and collect taxes, duties, imposts, and excises; all as more particularly set forth in the amended bill of complaint in this cause, a copy of which has heretofore been served upon you.

Dated this 24th day of December, 1931.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Complainant.

Copy received December 24, 1931.

John H. Dunbar, Attorney General; E. W. Anderson, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 36] (Copy)

In United States District Court for the Western District of Washington, Southern Division

In Equity. No. 458

A. Magnano Company, a Corporation, Complainant,

vs.

John H. Dunbar, as Attorney General of the State of Washington; Erle J. Barnes, as Director of Agriculture of the State of Washington, and Roland H. Hartley, as Governor of the State of Washington, Defendants

Opinion (on Motion to Dismiss, etc.)

Opinion—Filed March 1, 1932

The complainant by amended bill of complaint states that it is a corporation of the state of Washington and resident therein, and paid the annual license fee to the state pursuant to the provisions of law; alleges official character of the defendants; that during its 1931 session the State Legislature passed an act entitled "An Act relating to revenue and taxation, requiring distributors as therein defined to pay an excise tax on the sale of all butter substitutes, providing for licensing dealers therein, fixing a penalty for a violation of the provisions of the act, and declaring that this act shall take effect immediately." Chapter 23, Laws of Washington 1931.

It is alleged that the sole purpose of the act was to tax and burden the manufacture, interstate commerce in, and the sale of oleomargarine, in aid of the dairy industry of the state of Washington and protection against the competition of oleomargarine and "to completely destroy the [fol. 37] business of the complainant and all other persons, firms or corporations engaged in the manufacture within, the shipment in interstate commerce into, and the sale of oleomargarine within the State of Washington." That prior to the enactment of this act it was engaged in importing into the State of Washington from factories located outside, and selling oleomargarine in the state, an article of trade known as "Nucoa"; that it has complied

with the federal laws with relation to the classification and sale of its products; that the product was not sold in violation of any law of the state; that for many years past, and for a reasonable time after the passage of the act, the average annual sale of oleomargarine in the state had exceeded 2,000,000 pounds, of which approximately 1,500,000 pounds were shipped into the state; that prior to the passage of the act said article was sold in direct competition with dairy butter produced in the state; that many persons of moderate means purchased the same in preference to butter; that during the year 1926 the total production of dairy butter in the state was approximately 32,000,000 pounds, and that for a long time prior thereto and up to the present time production of butter in the state of Washington has been approximately at the same rate per annum; that the price of oleomargarine was 20 cents per pound, the wholesale price of dairy butter was 29 cents a pound, and the retail price 32 and 34 cents; that the retail price of oleomargarine was 25 cents; that since the effective date of said act no applications have been made to the Collector of Internal Revenue of the United States for wholesale or retail licenses under the federal statute; that up to the time of the passage of said act the complainant imported into the state said product (Nucoa) at a cost of 17 cents per pound [fol. 38] and sold to retailers for 20 cents a pound, who, in turn, sold it to the public for 25 cents a pound; that the defendant threatens to enforce the provisions of said act; that if a tax of 15 cents a pound is imposed all trade and commerce within the state of Washington will be destroyed; that the threatened enforcement has destroyed, and continues to destroy, plaintiff's traffic in said article.

It is alleged that said manufactured product is not taxable under the state law; that the act is violative of the Constitution of the United States and the amendments thereto by depriving the complainant of its property without due process of law and denies the equal protection of Article 14 of the Amendments; that it deprives complainants and their customers of freely purchasing and entering into contracts of purchase of said article; that the tax is not levied for public purposes, but the sole purpose is to burden this manufactured article; that it imposes an unjust and discriminatory burden upon the complainant in its relation to interstate commerce; that it violates Par. 3, Sec. 8, Art. 1,

of the Constitution of the United States, and interfere with the power of a municipality to levy and collect taxes, duties, imposts and excises, that it has no adequate remedy, and prays injunction, interlocutory and permanent.

The defendants have moved to dismiss on the ground that the bill does not state matters of equity entitling complainant to the relief prayed, or sufficient facts to afford such relief as was sought. With the motion to dismiss is filed an answer, in which it denies many of the allegations, and affirms on information and belief. The corporate entity of the defendant is admitted, denies all of the allegations with reference [fol. 39] [illegible] to constitutional impediment to the act, and by way of further answer says that during [illegible] the dairy industry of the state; that the state comprises 66,000 square miles of land, upon which are maintained 40,000 dairy farms, comprising an area of 250,000 acres of improved farm land, besides innumerable [illegible] farms devoted principally to the production of butter and other dairy products; that for the calendar year 1930 there were in the state 700,000 dairy cows producing 1,700,000,000 pounds of milk, 32,000,000 pounds of evaporated butter, 3,000,000 gallons of ice cream, 8,000,000 pounds of cheese, 50,000,000 pounds of evaporated and condensed milk, $15,000,000 worth of by-products, condensed and powdered skim milk, butter milk and casein; that for the year 1929 there were 700,000 dairy cows in the state, producing 1,700,000,000 pounds of milk, 29,800,000 pounds of evaporated butter, 3,000,000 gallons of ice cream, 6,700,000 pounds of cheese, 45,000,000 pounds of evaporated and condensed milk, $13,000,000 worth of by-products, condensed and powdered skim milk, butter milk and casein; that the total value of the cows and farm lands and equipment for their maintenance during each year was $183,000,000, not including creameries, condenseries and other similar properties; that the farm lands and equipment and properties of every kind are at the present time and for many years have been contributing heavily to the support of the state government and its various political subdivisions, while this complainant and all such other dealers in oleomargarine and other butter substitutes have escaped paying a just share of the tax burden; that the principal element of butter is butter fat produced by cows for which the market price at the present *price* is 28 cents a pound, [fol. 40] while oleomargarine consists basically of vegetable

oils at a cost of 8 cents a pound and skim milk at the ratio of 100 pounds thereof to 900 pounds of manufactured oleomargarine at a cost of $1.20; that oleomargarine is produced at from 35% to 55% of the cost of butter; that since the law has been enacted, due to economic conditions, the price of butter has been so low as to discourage the use by consumers of oleomargarine and butter substitutes; that the retail price of butter at the present time is 28 cents a pound, as against an average for the past five years of 28 cents per pound; that anticipatory to this litigation, the complainants have made no active attempt to sell their product.

[fol. 11] McMicken, Ramsey, Rupp & Schweppe, for complainants.

John H. Dunbar, Attorney General of the State of Washington, and E. W. Anderson, Asst. Attorney General of the State of Washington, for defendants. John B. Focarty, Esq., Philip D. MacBride, Esq., of counsel.

Before Wilbur, Circuit Judge, and Cushman and Neterer, District Judges, as a Statutory Three Judge Court.

Neterer, District Judge (after stating the facts):

At the time this case was argued it was stated that, with the final brief, a stipulation of facts would be filed, to the end that the issue may be disposed of upon the merits, avoiding the necessity of reconvening the three judge court. No stipulation has been filed. The respective parties, in their briefs, say that if the court denies the motion to dismiss, the facts will be stipulated.

Many of the pertinent facts arising, either directly or collaterally, in this case have been fully discussed in Best Foods, Inc. v. Welch, 34 Fed. (2) 682.

In view of the statements of the bill of complaint, which are denied by the answer but admitted by the motion to dismiss, and since Section 13 of the Act expressly exempts payment of the excise tax violative of interstate commerce "or the doing of any act which would constitute an unlawful burden upon the sale or distribution of butter substitutes, as herein provided, in violation of the Constitution or laws of the United States," it is felt that, after due consideration of the pleadings, the issue may not be fully and

[fol. 42] fairly disposed of by the court without the facts with relation to the disputed issues, either by stipulation or proof, and since the issue is largely the power of the state to tax, and as stated by the Supreme Court in Chicago G. W. Ry. Co. v. Kendall, 266 U. S. 94: "This court must respect in the fullest degree the sensitiveness of Congress in hedging about the sovereign power of taxation by the states and precluding temporary federal judiciary interference with it save in clear cases," we find ourselves unconvinced that the act complained of is so palpably unreasonable and arbitrary that we ought to grant an interlocutory injunction prayed for, but that the motion to dismiss should be denied, to the end that the court may be fully advised and substantial justice administered.

In denying the motion to dismiss, the motion for an interlocutory injunction is likewise denied, but in so doing we express no opinion of the merits of the controversy as they may develop upon the stipulation of the facts or upon final hearing. Weaver v. Palmer Brothers, 3 Fed. (2) 333.

[File endorsement omitted.]

[fol. 43] In United States District Court

[Title omitted]

Stipulation of Facts—Filed Sept. 13, 1932.

Come now the complainant and defendants, in the above entitled action and by and through their respective counsel stipulate that the following constitute the material facts therein:

Complainant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington and a resident and citizen of such state and has paid its annual license fee last due the state of Washington.

Defendant, John H. Dunbar, is the duly elected, qualified and acting attorney general of the state of Washington and a resident and citizen of said state and of the western district of Washington; defendant, Erle J. Barnes, is the duly appointed, qualified and acting director of agriculture of the state of Washington and a resident and citizen of

said state and of the western district of Washington; and defendant, Roland H. Hartley, is the duly elected, qualified and acting governor of the state of Washington and a resident and citizen of said state and of the western district of Washington.

[fol. 44] That this is a cause of civil nature in equity and that the matters in controversy arise under the constitution and laws of the United States and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

That the legislature of the state of Washington at its 1931 session regularly and duly enacted chapter 23, Laws of 1931, providing for the taxation of sales of butter substitute within the state at the rate of 15 cents per pound.

That complainant for many years immediately prior and up to the enactment of said chapter 23, Laws of 1931, was engaged in importing into the state of Washington from factories located in the state of California, and thereafter selling to bakeries, confectioners, grocers, institutions and other persons in the state of Washington, an article of trade and commerce known as "Nucoa."

That said Nucoa is classified by the government of the United States as oleomargarine; that the manufacture and sale of oleomargarine for more than thirty years continuously has been regulated by said government and over said entire period oleomargarine continuously has been and now is recognized by said government as a legitimate, wholesome and healthful article of commerce, and that oleomargarine has been in general use by that name throughout the United States for more than thirty years last past.

That all things have at all times been, and are, done necessary to make said Nucoa comply with all federal laws and regulations and all laws and regulations of the state of Washington relating to pure foods and the manufacture and sale thereof; and that all things have at all times been, and are, done necessary to make said product comply with all other federal laws and regulations, and all laws and [fol. 45] regulations of the state of Washington in any way regulating said article or the persons, firms and corporations engaged in the manufacture, importation and sale of the same. That said product has been continuously on the market for many years, and that it at all times has

been and is a pure, wholesome and nutritious food product made from animal and/or vegetable oils or fats emulsified with milk or milk products, to which salt has been added, and not containing eighty per cent of milk or butter fat; that said Nucoa is now and for many years has been used for cooking, baking, frying and general culinary and household purposes. That all of the materials used in the manufacture of said oleomargarine at all times have been and are of good quality, and all oils and fats at all times have been and are refined at high temperatures so as to insure their purity. That all milk used in the manufacture of said product at all times has been and is heated to a high temperature so as to insure purity before emulsification. That the color of the finished product sold and dealt in by the complainant at all times has been and is white and uncolored. That the resultant product at all times has been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is wholly original and independent product sui generis.

That, pursuant to federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon in letters three-fourths of an inch high the word "Oleomargarine"; that each individual one-pound print contained in said original package is packed in a carton which has printed or branded on the two principal panels thereof the word "Oleomargarine" in plain, [fol. 46] Gothic letters of not less than twenty-point type, which letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing that the said product is anything other than oleomargarine; that all purchasers of said product are at all times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the state of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for

butter, but was sold as a wholly original and independent product sui generis; and that since the passage of the said act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargarine only as a wholly original and independent product sui generis.

That for many years last past, and continuously up to the effective date of said act, the average annual sales of oleomargarine in the state of Washington have exceeded 5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the state of Washington, and approximately 3,700,000 pounds were shipped into the state of Washington from other states in the United States of America. That all oleomargarine that has been sold by any person, firms and corporations whomsoever in the state of Washington for many years last past and up to March 9, 1931, has had the characteristics and [fol. 47] been sold under the conditions described in paragraphs VIII, IX and X of the amended bill of complaint. That said oleomargarine of complainant and all other oleomargarine sold in the state of Washington at all times up to the passage of said act was sold in direct competition with dairy butter produced in the state of Washington; that thousands of persons of moderate means in the state of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargarine; that the total production of dairy butter in the state of Washington during the year 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to the present time the production of butter in the state of Washington has been at approximately the same rate per annum; that at the time of the passage of said act the wholesale price of oleomargarine in the state of Washington was twenty cents a pound and the wholesale price of dairy butter in the state of Washington was thirty-two cents a pound; that at the time of the passage of said act the retail price of said oleomargarine in the state of Washington was twenty-five cents a pound, and the retail price of butter in the state of Washington was from thirty-five to thirty-seven cents a pound; that at the time of the filing of the amended bill the wholesale and retail prices of oleomargarine and butter in the state of Washington were approxi-

mately the same as they were at the time of the passage of said act, and were approximately the same throughout the entire period since the passage of the act and up to the filing of the amended bill; that, today, on the 13th day of September, 1932, the wholesale price of butter in the state of Washington is twenty-two cents a pound; and the retail price twenty-four to twenty-six cents a pound; that the import price of Nucoa to complainant today is twelve [fol. 48] cents a pound; and that complainant, if it could sell said Nucoa free of said tax, would sell to retail dealers in the state of Washington at fourteen cents a pound, and said retail dealers in the state of Washington would in turn sell said product to the general public at seventeen cents a pound. That in the interval between the filing of the amended bill and today there has been a gradual and continuous decline of both said butter and oleomargarine prices down to the present date in the same general proportion as that above set forth.

That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within, the state of Washington of said product; and had and still has, within the said state, a large amount of property devoted to said business; that the business of complainant in the state of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9, 1931, had a regularly established business in which it imported from the state of California and sold in the state of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and the annual net profits of said business in said state during said period exceeded the sum of $20,000.00 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9, 1931, said importation and sales of

[fol. 19] oleomargarine by the complainant in the state of Washington were as follows:

Year	Pounds Sold
1929	2,022,762
1930	2,176,056
1931 up to March 9	145,815

That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same has not imported from the state of California and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the state of Washington for use and sale in the state of Washington, or imported into or sold in the state of Washington any such oleomargarine.

That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the state of Washington under the provisions of said act for the reason that, since said date, no sales of oleomargarine subject to tax under said act have been made; that since the effective date of said act no applications have been made to the collector of internal revenue of the United States in the state of Washington for wholesale or retail licenses under the federal statutes to sell oleomargarine in the state of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the state of Washington under said federal statutes since such date, nor has the government of the United States derived any revenue from sales of oleomargarine within the state of Washington since such date.

That for a long time prior to and up to the time said act imposing a tax of fifteen cents per pound became effective, complainant imported into the state of Washington said [fol. 20] Nucoa at a cost of seventeen cents per pound, and sold said product to retail dealers in the state of Washington at twenty cents per pound, who, in turn sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said act up to the time of filing the amended bill the price per pound at which complainant could import said product and, if not taxed under said act, could sell the same to retail dealers, and the price per pound at which retail dealers in the state of Wash-

ington could resell to the general public has remained the same, and that since the date of filing the amended bill down to the date of this stipulation there has been a gradual decline in said respective oleomargarine prices to the extent hereinbefore set forth. That these facts apply without substantial variations to all other persons, firms and corporations engaged in manufacturing, importing and/or selling oleomargarine within the state of Washington.

That defendants have at all times since the effective date of Chapter 23, Laws of 1931, threatened and continue to threaten to enforce against complainant and all others similarly situated a tax of fifteen cents per pound on all oleomargarine sold by them within the state of Washington. That the defendants states that it is their intention to enforce said Chapter 23 of the Laws of 1931 against all sales of oleomargarine that may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and join in the expense of this proceeding. That the complainant has no adequate remedy at law.

[fol. 51] That dairying is one of the basic industries of the state of Washington; that the state comprises 66,811 square miles of land upon which there are 40,806 dairy farms comprising in excess of 250,000 acres of improved farm land besides innumerable lesser farms devoted partially to the production of butter and other dairy products.

That according to the official report of the state department of agriculture for the calendar year 1930, there were in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,791,384,000 pounds
Creamery butter	32,925,767 pounds
Ice cream	3,598,466 gallons
Cheese	8,264,332 pounds
Evaporated and condensed milk	54,545,568 pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$1,514,0[illegible] 00

That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,403 pounds
Creamery butter	29,804,970 pounds
Ice-cream	5,425,523 gallons
Cheese	6,788,283 pounds
Evaporated and condensed milk	41,610,900 pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$3,203,086.85

That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties.

Dated this 13th day of September, 1932.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Complainant. John H. Dunbar, E. W. Anderson, John B. Fogarty, Philip D. MacBride, Solicitors for Defendants.

[fol. 52] [File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence—Filed Oct. 21, 1933

Be it remembered, that the above entitled cause came on regularly for trial before the above entitled court, duly convened pursuant to Section 266 of the Judicial Code of the United States and consisting of the following judges, to-wit, the Honorable Curtis D. Wilbur, Circuit Judge for the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington, sitting in equity, on the 13th day of September, 1932, the complainant appearing by its counsel, Alfred J. Schweppe, of McMicken, Ramsey, Rupp & Schweppe, and the defendants appearing by E. W. Anderson, Assistant Attorney General of the State of Washington, and John P. Fogarty and Philip D. MacBride.

Said hearing was had upon the stipulation of facts dated September 13, 1932, signed by the solicitors for the complainant and defendants, respectively, and upon the following proceedings and evidence:

Judge Wilbur stated that he understood counsel wished to present evidence that would take about fifteen minutes, [fol. 54] and it was stated to him that the contesting parties had prepared a written stipulation of facts, executed by counsel, which was thereupon filed.

JOHN A. McGREGOR was then called as a witness on behalf of the complainant, and, having been first duly sworn, was examined and testified as follows:

Direct Examination:

My name is John A. McGregor. I am associated as vice president with A. Magnano Company, the complainant in this case. That company has in past years, up to March 9, 1931, been engaged in the sale of oleomargarine, commonly known in the trade as "Nucoa." The complainant in this action has not since March 9, 1931, sold any oleomargarine in the State of Washington, and that is true right down to the present date. If A. Magnano Company had put on, in addition to the import price which is set forth in the agreed statement of facts, the fifteen cents a pound tax, the complainant could not have sold any oleomargarine in the State of Washington since March 9, 1931, down to the present date.

Judge Wilbur: Why not?

The Witness: It could not have been sold without it would have been higher than butter, with the tax added on to our cost.

Thereupon the witness continued, on direct examination:

We could not have sold a pound of oleomargarine or Nucoa during this period except at a loss. We have made no attempt whatsoever to sell it at a loss. I know of no other wholesaler who has sold any oleomargarine in the State of Washington since March, 1931. We could not sell it because the tax prohibited us from selling it. It made it higher than the competition of butter.

[fol. 55] Cross Examination:

On cross examination by Mr. Anderson, Assistant Attorney General of the State of Washington, the witness testified as follows:

My company has not tried to sell any oleomargarine in the State of Washington since the act was passed, because it would have been impossible to have sold it with the tax added. That is the only reason. If we could have sold it at a profit, we would have been happy to sell it.

Whereupon the complainant rested its case.

Dr. Herbert Prior was called as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct Examination:

My name is Dr. Herbert Prior. I am Supervisor of the Dairy and Livestock Division of the Department of Agriculture of the State of Washington.

Over the objection of complainant's counsel, the witness was permitted to testify as follows:

I have made a survey for the purposes of this case with reference to the amount of property taxes paid by the dairy farmers of the State of Washington. I can give you the results of our survey. The real estate taxes paid by the farmers of the State of Washington on properties used to raise forage and feed for their cows are $8,436,482, and on personal property $2,402,272. Those are the taxes they report paying.

[fol. 56] Cross-examination:

On cross-examination by Mr. Schweppe, the witness testified as follows:

I arrived at these figures by sending out questionnaires to the dairy farmers of the State of Washington. I identified the dairy farmers as those who had cows, and we have made a hundred per cent test of all the cattle in this state for tuberculosis, and we have that record. What I am recording in this statement I have just furnished to the court is simply the voluntary statement furnished to me by farmers in response to this inquiry that I sent out.

Redirect examination:

On redirect examination by Mr. Anderson, the witness testified as follows:

There are approximately 60,000 dairy farmers in this state.

JULIUS A. HALL was called as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct examination:

My name is Julius A. Hall. I reside in Seattle. For the past few years I have been engaged in the creamery business and in the oleomargarine business. I was in the business of manufacturing oleomargarine ten years in the city of Seattle.

COLLOQUY

Judge Wilbur: What do you want to prove by this witness?

Mr. Anderson: I offer to prove, if the Court please, by this witness the production cost of the article known as oleomargarine as alleged in our affirmative answer and not included in the stipulation.

[fol. 57] Judge Wilbur: I think that if counsel went into that question you might take a good deal of evidence and a good deal of time. What do you contend the cost is?

Mr. Anderson: We contend that the production cost is on present figures about six cents a pound.

Judge Wilbur: I think there is evidence that it is about twelve so far.

Mr. Anderson: I don't think there is any allegation as to that in the bill of complaint. Our purpose is merely to show a basis for classifying this property separate and apart from butter. This man——

Judge Wilbur (interrupting): That has been recognized by the courts, and by the legislature, and the classification has been sustained.

Mr. Anderson: I realize, if the Court please, that the classification has been sustained.

Judge Wilbur: My recollection is that they did affirmatively allege the cost of production in the complaint. Is that not true?

Mr. Schweppe: No. We allege in the complaint the cost to this complainant of oleomargarine laid down in the State of Washington imported from California and from other states. The fact that counsel is seeking to prove I think is immaterial, if it is solely for the purpose of proving classification, because that we would concede. There is a basis for classifying oleomargarine separately from butter entirely independent of such proof as this, and for the purpose of shortening the proceedings I make the objection.

Mr. Anderson: If the Court please we won't urge the point.

Judge Cushman: You say you do not urge it?

[fol. 58] Mr. Anderson: We won't urge it or press it.

(Witness excused.)

Mr. Anderson: We rest.

Whereupon the defendants rested their case, testimony closed.

Judge Wilbur: I understand that counsel are prepared to submit the case on the briefs already filed in the case, together with the stipulation of facts filed and the evidence which has just been introduced?

Mr. Anderson: Yes, your Honors.

Judge Wilbur: Court is adjourned.

STIPULATION AS TO STATEMENT OF EVIDENCE

It is hereby stipulated that the foregoing constitutes a true and complete statement of the evidence taken in the above entitled cause, and that the said statement may be allowed and approved and ordered filed in the above entitled cause.

Dated this 18th day of October, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for Complainant. G. W. Hamilton, Attorney General of the State of Washington, E. P. Donnelly, Assistant Attorney General, Attorneys and Solicitors for Defendant.

[fol. 59] ORDER APPROVING STATEMENT OF EVIDENCE

On this 21st day of October, 1933, the foregoing statement having been presented, the same is hereby in all things allowed and approved as a true and complete statement of the evidence taken in the above entitled cause, and the same is hereby ordered filed as a "Statement of the Evidence" to be included, together with the Stipulation of Facts therein referred to, dated September 13, 1932, in the record on appeal in the above entitled cause, as provided in paragraph (b) of Equity Rule 75.

Done at Tacoma this 21st day of October, 1933.

Edward E. Cushman, District Judge.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity. No. 458

A. MAGNANO COMPANY, a Corporation, Complainant,

vs.

JOHN H. DUNBAR, as Attorney General of the State of Washington, Erle J. Barnes, as Director of Agriculture of the State of Washington, and Roland H. Hartley, as Governor of the State of Washington, Defendants.

Before Wilbur, C. J., and Cushman and Neterer, D. JJ.

OPINION—Filed Jan. 17, 1933

In — Fed. (2) —, the court stated that it was "unconvinced that the act complained of [see pages A, B and C in footnote] is so palpably unreasonable and arbitrary that the interlocutory injunction should be granted."

Now, at trial on stipulation and evidence it appears that the complainant prior to the effective date of the act complained of, requiring payment of an excise tax of fifteen cents per pound on all butter substitutes sold within the state, was engaged as a line in its business in importing into the state and selling within the state and manufactur-

ing within the state "Nucoa," an article classified as oleomargarine, and had complied with all of the federal and state laws and regulations relating to pure food and manufacture and sale thereof; that the average sales per annum of "Nucoa" in the state of Washington have exceeded 5,000,000 pounds, of which 1,300,000 pounds were manufactured intrastate; that the total production of dairy butter intrastate during the year 1930 was approximately 33,000,000 pounds, and the retail was 32 to 37 cents per pound; that on the 13th day of September, 1932, approximately the date of trial, the wholesale price of butter in the state was 22c per pound, and the retail price 24 to 26c per pound; that the import price of Nucoa was 12c per pound and sold by the wholesaler at 14c, and the retailer at 17c; and that there has been a continuous decline in the price of both butter and oleomargarine; that complainant had a regularly established trade and the net profits from the sale of Nucoa exceeded the sum of $20,000.00 net per annum; that since the effective date of said act, no importations or sales have been made; that before the effective date, complainant imported into the state said commodity at 17c and sold it at 20c a pound to the retail dealer, who, in turn, sold it at 25c a pound; that dairying is one of the basic industries of the state, consisting of 40,800 dairy farms, comprising in excess of 250,000 acres of improved farm land, besides innumerable lesser farms devoted partially to the production of butter and other dairy products; that the total value of cows and equipment necessary for their maintenance was $183,600,000, not including creameries, condenseries and other similar property. The tax paid by the dairy farmers "on property used to raise forage and feed for cows" was $8,436,482, and on personal property $2,402,272; and upon trial the defendant offered to show Nucoa oleomargarine could be manufactured at 6c a pound, but over the objection of defendant, upon the ground of immateriality, the offer was withdrawn.

The complainant claims the act deprives it of its property ($20,000 profit per annum) without due process and is violative of the interstate commerce clause.

[fol. 62] It is contended that the sole purpose is to burden the manufacture, interstate commerce in, and the sale of oleomargarine, in aid of the dairy industry in the state and

destroy the business of complainant in the shipment into and sale of oleomargarine within the state.

McMicken, Ramsey, Rupp & Schweppe, for complainant; A. M. Davis, W. R. Brown, of Counsel.

John H. Dunbar, Attorney General of State of Washington; E. W. Anderson, Asst. Atty. General of State of Washton; John B. Fogarty, Philip D. MacBride, for Defendants.

Before Wilbur, C. J., and Cushman and Neterer, D. J.J.

Neterer, D. J. (after stating the facts as above):

The state has full power to prescribe any system of taxation, judged in the light of its practical application to the affairs of men as usually conducted, not so arbitrary or extravagant as to constitute an abuse of power, which in the judgment of its legislators is necessary for its people. Southwestern Oil Company v. Texas, 217 U. S. 114, 126; Mountain Timber Company v. State of Washington, 243 U. S. 219, 237; North Laramie Land Company v. Hoffman, 268 U. S. 276. And this court may not inquire into the motives of the legislature in enacting the law. Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 161; Arizona v. California, 283 U. S. 423, 455. The court must presume that the challenged act was enacted in good faith and be not by its necessary and natural operation destructive of rights secured by the Constitution. Lane v. Barber, 136 [fol. 63] U. S. 313. And considering such operation, the court is not limited to the mere phrase, but looks beyond the letter in such cases. Pleasant Twp. v. Aetna Life Ins. Co., 138 U. S. 67, 75; Lochner v. New York, 198 U. S. 45, 65; Mountain Timber Co. v. Washington, supra.

The court may judicially notice facts and matters shown with facts established by the evidence. Weaver v. Palmer Bros. Co., 270 U. S. 402, 410. See, also, Quong Wing v. Kirkendall, 223 U. S. 59, 64. Sale in interstate commerce is not forbidden by the act; nor is the introduction of oleomargarine, which is not affected, regulated. Shollenberger v. Pennsylvania, 171 U. S. 1, 19; nor is its practical effect prohibitory. Collins v. New Hampshire, 171 U. S. 30, 33. There is no tax on sale of oleomargarine. It may be introduced and sold in the state without tax by moving in interstate commerce from without the state direct to the con-

sumer within the state. The tax is assessed on the dealer, the amount of tax being measured by the quantity sold, and is operative only when the interstate commerce relation to the oleomargarine is ended. To carry on trade within the state an excise tax is fixed, and this may be done, if not "so extravagant or arbitrary as to constitute an abuse of power." Mountain Timber Co. v. Washington, supra, at page 237.

The act in issue is unlike any of the numerous cases cited. It has relation to public revenue and local welfare rather than regulatory of local business, as in Real Silk Hosiery Mills v. Bellingham, 1 Fed. (2) 934; and as In Re Bok (District Court of Appeals, California, not reported). Nor does a municipal ordinance bear the same status as to judicial review as a state statute. Roach v. Ephen, 99 So. 609; State v. Wilson, 168 Pac. 679. Nor does the act [fol. 64] prohibit business under penalty, as Adams v. Tanner, 244 U. S. 590; see, also, Weaver v. Palmer Bros. Co., 270 U. S. 402, 410.

The instant issue must rest upon conditions of local welfare in the light of the reasonableness and with relation to the profits on oleomargarine and butter, public revenue, and the status of the parties, and the common good; and be predicated on a reasonable basis on the existing status in the disparity of production cost and reasonable profit and value of oleomargarine and butter, and the reasonable necessity of the tax in equality of right for the common good.

"The general legislative purpose is plain and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject." Williams v. Fears, 179 U. S. 270.

"But there is still another difficulty in the way of holding this tax invalid. Had this court, or any court, the right to say that a tax may not be levied because in the judgment of the court the amount is so much that it would not reasonably have been intended to produce revenue?" Sperry & Hutchinson Co. v. Blue, 202 Fed. 82 (C. C.).

Chief Justice Marshall, in McCulloch v. Maryland, 17 U. S. 315 (4 Wheat.):

"The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government the right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse."

[fol. 65] And the same jurist in Providence Bank v. Billings, 29 U. S. 514 (4 Pet.) 9 Curtis 171, referring to the taxing power, says:

"It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies * * *. This vital power may be abused; but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally."

In Austin v. Boston, 74 U. S. 694 (7 Wall.):

"The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

In Spencer v. Merchant, 125 U. S. 345:

"The power to tax belongs exclusively to the legislative branch of the government. * * * 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.'"

In McCray v. United States, 195 U. S. 27, Chief Justice White said:

"It is, however, alleged, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the constitution will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse of one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."

In Kehrer v. Stewart, 197 U. S. 60, in discussing an occupation tax upon meat dealers, it is said:

"What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state [fol. 66] legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here."

And on a federal tobacco tax, in Patton v. Brady, Adm'x, 184 U. S. 608, 623:

"It is not the province of the judiciary to inquire whether the exercise is reasonable in amount, or in respect to the property to which it is applied. These are matters in respect to which the legislative determination is final."

Mr. Justice Day, in Flint v. Stone, Tracy Co., 220 U. S. 107, said:

"It is urged that this power can be so exercised by Congress as to practically destroy the right of the states to

create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in McCulloch v. Maryland, that the power to tax involves the power to destroy. This argument has not been infrequently addressed to this court with respect to the exercise of the power of Congress."

And held a corporation tax not void as lacking due process under the Fifth Amendment.

In Alaska Fish Co. v. Smith, 255 U. S. 44, in re excise tax of $2.00 a barrel or ton upon per on manufacturing fish oil, fertilizers, etc., and

"The complainant alleges that the tax will prohibit and confiscate the plaintiff's business. * * * Even if the tax should destroy a business, it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk."

In The Child Labor Tax Case, 259 U. S. 20, the court, among other things, said, as far as applicable here:

"If it were an excise on a commodity or other thing of value we might not be permitted under the previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. * * *

"And with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive."

[fol. 67] In Veazie Bank v. Fenno, 75 U. S. 533 (8 Wall.), the court said:

"It will be observed that the sole objection to the tax there was its excessive character. Nothing else appeared on the face of the act."

And held a ten per cent tax on currency constitutionally warranted. As in the instant case, the only matter urged is excessive tax. The tax operated with the same effect throughout the state, and is therefore uniform. Patton v. Brady, Adm'x, 184 U. S. 608, 628. The act being for revenue, the court cannot consider the reasonableness of the amount. Spencer v. Merchant, supra. The distinction between a regulatory tax and one solely for revenue is that

the regulatory tax must bear a reasonable relation to cost of such regulation. Standard Oil v. Graves, 249 U. S. 389; Best Foods v. Welch, 31 Fed. (2) 682. The reasonableness of the revenue act is not open to judicial review unless the organic law is violated, but the reasonableness of a municipal ordinance, except where it conforms strictly to express and specific legislative grant, is more amenable to judicial review and determination. Rogeh v. Ephen, 90 So. 609 (Fla.); State v. Wilson, 189 Pac. 679 (Kans.).

The court must presume that the legislators acted in the exercise of their official responsibility and, by public authority within the limitations of the organic law. United States v. Castillero, 67 U. S. 1, 340; see, also, United States v. Arredondo, 31 U. S. 691, 728 (6 Pet.). And the court may not inquire into the legislative motive. United States v. Des Moines, etc. Co., 142 U. S. 510; Arizona v. California, 283 U. S. 423. And in considering the unconstitutionality of the act, the court must recognize that the Constitution, the soul of the nation, is an organism of increasing growth and [fol. 68] vitality, expansive with the unfolding necessities of the people for the common good, and, as said by Chief Justice Marshall in McCulloch v. Maryland, 17 U. S. 315, at 413 (4 Wheat.), "intended to endure for ages to come, and, consequently, be adapted to the various crises of human affairs," and comprehended changed conditions arising, inspired by many generations having relation to new issues of adjustment, not present, perhaps, in the instant form in the minds of the Constitution makers, in the general unfolding of the problems of our civilization, but within expansive thought and spirit, contributing to a balance for the common good, and that the agriculture, of which dairying is a part, and the machine synthetic chemical or combination of natural products enterprise may be balanced in proper relation. "No nation can bear wealth that is not intelligent first" (Beecher). And while differentiation between the artificial and the natural, the man of annual net profit of more than $20,000.00 from sale of 5,000,000 pounds of oleomargarine, not while in interstate commerce, but after it became at rest in the state, and the man of production and sale of 38,000,000 pounds of butter, "bowed by the weight of centuries he leans upon his cane and gazes on the ground: the emptiness of the ages in his face, and on his back the burden of the world * * * (this over-

draws the condition somewhat, but challenges the thought to the issue) may not have been so vivid as when the state legislature sought to, in some degree, balance the burden, and "give back the upward looking and the light" and inspire in the farmer courage and hope of at least partial relief. The thought, however,

"Wealth in gross is death, but life diffus'd;
As poison heals, in just proportion used;
In heaps, like ambergris, a stink it lies,
But well dispersed, in incense to the skies" (Pope)

[fol. 69] may have been present.

The dealer, by the Constitutional Amendments, is not guaranteed an exorbitant profit, but is entitled to reasonable profit; he is not entitled to special privilege, but is entitled to equal right; is not entitled to tax exemption while the dairyman is taxed to support the government for his and the dealer's protection. Each must pay taxes in equal right for mutual benefit. May the court relieve the plethora of $20,000 annual profit of the dealer on the sale of Nucoa, one fourth of which is from intra state manufacture, from tax contribution and burden the little or no profit of the farmer by exacting taxes; give to the dealer that hath large profit, and take from the farmer that hath little or no profit, even that which he seemeth to have; and do so without proof that the dealer's profit is a reasonable return on capital invested.

The tax, while evidently not imposed to prevent practical monopoly of business or as a regulatory measure, is a measure in aid of public revenue. The omission of the act, however, could obviously leave a status which could create such a monopoly as might compel the retirement of the cow from the competitive field and take from the state nearly $11,000,000 taxes annually; and from human life, dairy products, without which "the race cannot survive."

The dairyman pays annual taxes of $10,838,754, and produces 33,000,000 pounds of butter and some by-products. The dealer in oleomargarine sells in competition more than 5,000,000 pounds of oleomargarine, or practically 1 6 as much as the dairyman of butter, and enjoys the privilege of $20,000.00 net annual income without contributing to the

maintenance of state and local government which gives it protection and whose benefits it enjoys.

[fol. 70] There is no evidence that dealing in oleomargarine is plaintiff's exclusive business, the inference is that such dealing is a line among others in its general business.

In The Best Foods, Inc. v. Welch et al., 34 Fed. (2) 682, 686, it was said.

"This court has no interest in the policy of the state revenue laws, so long as equal protection is not denied, and is reasonable and not purely arbitrary. Nor is the Fourteenth Amendment concerned with state legislation where there is a real difference and it will not create an artificial equality. Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 193, 56 L. Ed. 350. There is no equality between the cow on the farm and her natural product, 'butter,' and the manufacturing plant * * * and its artificial product, 'oleomargarine.' Each product has food value, but composed of different elements, and the difference determines between them as food, and is a just basis for classification. 'Any classification is permissible which has a reasonable relation to some permitted end of governmental action' * * * of the classification is reasonably founded in the 'purposes' and policy of taxation.' Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 85, 67 L. Ed. 237; Watson v. State Comptroller, 254 U. S. 122, 41 S. Ct. 43, 65 L. Ed. 170. The state 'may impose different specific taxes upon different trades and professions * * *.' Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 535, 33 L. Ed. 892.

"The act in issue exacts a definite license fee. It is significant that this money is placed in the general fund of the state and appears in the relation of a taxation measure, and as such may be sustained, and if for revenue the court cannot consider the reasonableness of the amount. Cooley on Taxation, Vol. 1, Sec. 29. The exercise of acknowledged power to tax may not be scrutinized by the court. The responsibility rests upon the legislature, and if unreasonably exercised, redress rests with the people."

The excise tax in the instant case bears the same relation as the license fee.

The act in issue specifically excludes operation against the interstate commerce clause, and no tax is exacted until

the article has become at rest and wholly within the jurisdiction of the state for the purposes of taxation, and the manufacture of 1,300,000 pounds of oleomargarine within the state per annum is not shown to be prohibitive with [fol. 71] relation to reasonable profit on investment. The profit on sale intrastate is approximately one-fourth, or $5,000.00. The burden is upon the plaintiff to sustain the prohibitive character. The arbitrary wholesale price of the product on its importation into the state is no proof of cost of manufacture and reasonable profit of local product. The claim of the plaintiff that it has created an established trade within the state which produced a net profit of more than $20,000.00 annually derived from imported articles not affected by the act, and the local manufacture, and that the tax assessed is prohibitive and destroys the business, is not sustained by the proof. The plaintiff may, without tax, supply its customers by delivery direct from the plant to the consumer. Nor is the fact that it has ceased operation since the effective date of the act, and that no revenue has been derived by the state by reason of such act, persuasive upon this record. The manufacturer in the state and shipper into the state, and the distributor within the state, may not, by their conduct arbitrarily control the legislative act of the sovereign state against the common good by fixing a price of intrastate manufactured articles, irrespective of the cost of production, and "strike" or quit trading as against legislation fixing a tax upon dealers of oleomargarine within the state in aid of public revenues.

There is no proof that the oleomargarine cannot be manufactured at such price as would return the plaintiff a reasonable profit upon its investment after the payment of the tax required by the state law. The arbitrarily fixed price which produced the $20,000.00 net annual income may not rebut the presumption in favor of the reasonableness of the act and against arbitrary conduct of the legislators. [fol. 72] The court must presume that the legislators made due inquiry into the cost of production, the reasonable profit and the common good, and bearing in mind this presumption, the court is not required to overlook the offer of defendants to prove the manufacturing cost of oleomargarine to be six cents per pound, and while the offer is not evidence, the unwillingness of plaintiff for the court to be

advised does not take from the presumption, which must prevail.

That the oleomargarine is placed in a class by itself does not appear to be challenged.

The state excise tax does not burden plaintiff's business, if delivered from the plant direct to the consumer, thus only affecting interstate commerce incidentally and remotely, and is valid, where it is not clear that it is imposed for the covert and ulterior charged purpose. Hump Hairpin Co. v. Emmerson, 258 U. S. 290.

Placing in competition the farmers with 306,000 cows in the state, with a butter production of 33,000,000 pounds and some by-products, with the plaintiff engaged in selling in the state more than 5,000,000 pounds of oleomargarine per annum (aside from others so engaged), requiring the cow and the farm which supports her to contribute to the maintenance of state and local government taxation, and affording protection to the dealer in the state of oleomargarine without contributing to the public tax for such support, challenges the state's power to keep alive. Taxation, under the general taxing power, rests wholly within the discretionary power of the state. State v. Nelson, 36 Ida. 713, 213 P. 358; Standard Oil Co. v. Graves, 249 U. S. 389; Best Foods v. Welch, 34 Fed. (2) 682.

If the intelligent, patriotic duty of the state legislators, [fol. 73] in equality of right and for the common good, deem it wise to more equally distribute the burdens of public revenue, and relieve the owners of the cows and dairy utilities of some of the $11,000,000 tax paid per annum, by requiring the dealers in oleomargarine to contribute to the expense of the government whose protection they receive and whose benefits they enjoy, by requiring payment of an excise tax on sales in the state by the dealer, the court should give critical consideration to incentive to industry within the state to the policy and purpose of taxation within constitutional limitations to the state's well being and for the common good. The equality clause is not affected where the requirements are impartially applied to all elements of a class, and similarly circumstanced persons. State v. Horn, 27 Ida. 782. The state may tax property moved in interstate commerce after such property has become at rest therein and before sale. Woodruff v. Parham, 75 U. S. 123 (8 Wall.); Brown v. Houston, 114 U. S. 622;

Askren v. Continental Oil Co., 252 U. S. 444; Best Foods v. Welch, supra.

The court may judicially notice the distressing condition of agriculture, present in the mind of the legislators, not only in this state, but throughout the nation, and the unusual economic conditions at the time and since the effective date of the act, and that by reason of the excessive burdens there exists an unrest which may not be superficially passed, and in view of the burden placed upon the complainant to establish unlawful the tax, we find ourselves unconvinced that the act complained of is so palpably unreasonable and arbitrary as to be forbidden; and, after fully and fairly considering the facts and stipulated evidence in this case, we are convinced that the act is consti-
[fol. 74] tutionally sound and the case should be dismissed.

And it is so ordered.

[fols. 75–77] [Chapter 23—Excise Tax on Sale of Butter Substitutes—Omitted. Printed side pages 15-18, ante.]

[fol. 78] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Wilbur, C. J., and Cushman and Neterer, D. JJ.

CONCURRING OPINION—Filed Jan. 17, 1933

CUSHMAN, District Judge:

I concur in the conclusion reached in the foregoing opinion that the bill of complaint in this suit should be dismissed.

The act of the legislature attacked became effective March 9th, 1931. The bill of complaint herein was filed September 18th, 1931. The stipulation of facts was filed September 13th, 1932.

If it has been clearly shown that the law was passed in order to prohibit or prevent the sale of oleomargarine in the State of Washington, with no bona fide purpose on the part of the legislature to raise revenue, it may be conceded that the law is invalid and complainant entitled to an in-

junction, providing it has been shown that it would suffer if the provisions of the act were enforced.

It has been contended upon the part of the complainant that such showing has been made; that such a purpose is to be inferred from the amount of the tax—fifteen cents [fol. 79] per pound; the prevailing prices of butter and Nucoa—a brand of oleomargarine dealt in by the complainant—at the time of the enactment and the fact that since the act became effective no sales of oleomargarine subject to the tax provided by the act have been made and no revenue received by the State of Washington under the act.

In view of the short time which has elapsed since the act became effective, coupled with the low range of prices in farm products which have prevailed during the period in question, an extraordinary condition of which the court will take notice (Atchison, Topeka & Santa Fe Railway Co. vs. United States, 284 U. S. 248), and the effect of such low prices upon the advisability of attempting to market a butter substitute with a fixed tax upon it in a very considerable amount, an inference of such an intent on the part of the legislature is unwarranted. The time which has elapsed does not constitute a test period of reasonable length under the conditions which have existed.

It is also to be noted that there has been nothing shown in this case as to the cost of the material used in making oleomargarine nor the cost of its manufacture or transportation, nor the cost of marketing it at wholesale or retail.

The stipulation of facts recites:

"That complainant for many years immediately prior and up to the enactment of said chapter 23, Laws of 1931, was engaged in importing into the state of Washington from factories located in the state of California, and thereafter selling to *bakeries, confectioners, grocers, institutions and other persons* in the state of Washington, an article of trade and commerce known as 'Nucoa'." (Italics mine.)

The act clearly shows that it was not intended to forbid [fol. 80] interstate sales of oleomargarine. No showing has been made as to whether complainant's interstate sales have increased since the law became effective and to what

extent. With the law taxing infrastate sales and leaving interstate sales untaxed it is quite possible that the law has benefitted rather than injured the complainant insofar as its customers are of the description particularly pointed out above.

[File endorsement omitted.]

[fol. 81] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Aug. 29, 1933

The above-entitled cause came on for final hearing on September 13, 1932, before this court, consisting of three judges, pursuant to Section 266 of the Judicial Code of the United States, to-wit, the Honorable Curtis D. Wilbur, Circuit Judge for the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington, and the court having considered the stipulation of facts herein and the additional evidence introduced by the parties hereto, and having heretofore rendered its opinion in this cause, as reported in 2 F. Supp. 417, the court now makes the following

Findings of Fact

I

Complainant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington and a resident and citizen of such state and has paid its annual license fee last due the state of Washington.

[fol. 82] II

Defendant G. W. Hamilton is the duly elected, qualified and acting attorney general of the state of Washington and a resident and citizen of said state and of the western district of Washington; defendant Walter J. Robinson is the duly appointed, qualified and acting director of agriculture

of the state of Washington and a resident and citizen of said state and of the western district of Washington; and defendant Clarence D. Martin is the duly elected, qualified and acting governor of the state of Washington and a resident and citizen of said state and of the western district of Washington.

III

That this is a cause of a civil nature in equity and that the matters in controversy arise under the constitution and laws of the United States and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

IV

That the legislature of the state of Washington at its 1931 session regularly and duly enacted chapter 23, Laws of 1931, providing for the taxation of sales of butter substitute within the state at the rate of 15 cents per pound.

V

That complainant for many years immediately prior and up to the enactment of said chapter 23, Laws of 1931, was engaged in importing into the state of Washington from factories located in the state of California, and thereafter selling to bakeries, confectioners, grocers, institutions and other persons in the state of Washington, an article of trade and commerce known as "Nucoa."

[fol. 83]

VI

That said Nucoa is classified by the government of the United States as oleomargarine; that the manufacture and sale of oleomargarine for more than thirty years continuously has been regulated by said government and over said entire period oleomargarine continuously has been and now is recognized by said government as a legitimate, wholesome and healthful article of commerce, and that oleomargarine has been in general use by that name throughout the United States for more than thirty years last past.

VII

That all things have at all times been, and are, done necessary to make said Nucoa comply with all federal laws

and regulations and all laws and regulations of the state of Washington relating to pure foods and the manufacture and sale thereof; and that all things have at all times been, and are, done necessary to make said product comply with all other federal laws and regulations, and all laws and regulations of the state of Washington in any way regulating said article or the persons, firms and corporations engaged in the manufacture, importation and sale of the same. That said product has been continuously on the market for many years, and that it at all times has been and is a pure, wholesome and nutritious food product made from animal and/or vegetable oils or fats emulsified with milk or milk products, to which salt has been added, and not containing eighty per cent of milk or butter fat; that said Nucoa is now and for many years has been used for cooking, baking, frying and general culinary and household purposes. That all of the materials used in the manufacture of said oleomargarine at all times have been and are of good quality, and all oils and fats at all times have [fol. 84] been and are refined at high temperature so as to insure their purity. That all milk used in the manufacture of said product at all times has been and is heated to a high temperature so as to insure purity before emulsification. That the color of the finished product sold and dealt in by the complainant at all times has been and is white and uncolored. That the resultant product at all times has been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is a wholly original and independent product sui generis.

VIII

That, pursuant to federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon, in letters three-fourths of an inch high the word "Oleomargarine"; that each individual one-pound print contained in said original package is packed in a carton which has printed or branded on the two principal panels thereof the word "Oleomargarine" in plain, Gothic letters of not less than twenty-point type, which letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing

that the said product is anything other than oleomargarine; that all purchasers of said product are at all times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the state of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

[fol. 85]

IX

That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for butter, but was sold as a wholly original and independent product sui generis; and that since the passage of the said act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargarine only as a wholly original and independent product sui generis.

X

That for many years last past and continuously up to the effective date of said act, the average annual sales of oleomargarine in the state of Washington have exceeded 5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the state of Washington, and approximately 3,700,000 pounds were shipped into the state of Washington from other states in the United States of America. That all oleomargarine that has been sold by any person, firms and corporations whomsoever in the state of Washington for many years last past and up to March 9, 1931, has had the characteristics and been sold under the conditions described in paragraphs VII, VIII and IX of these findings of fact. That said oleomargarine of complainant and all other oleomargarine sold in the state of Washington at all times up to the passage of said act was sold in direct competition with dairy butter produced in the state of Washington; that thousands of persons of moderate means in the state of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargarine; that the total production

of dairy butter in the state of Washington during the year [fol. 86] 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to September 13, 1932, the production of butter in the state of Washington has been at approximately the same rate per annum; that at the time of the passage of said act the wholesale price of oleomargarine in the state of Washington was twenty cents a pound and the wholesale price of dairy butter in the state of Washington was thirty-two cents a pound; that at the time of the passage of said act the retail price of said oleomargarine in the state of Washington was twenty-five cents a pound, and the retail price of butter in the state of Washington was from thirty-five to thirty-seven cents a pound; that at the time of the filing of the amended bill the wholesale and retail prices of oleomargarine and butter in the state of Washington were approximately the same as they were at the time of the passage of said act, and were approximately the same throughout the entire period since the passage of the act and up to the filing of the amended bill; that on the 13th day of September, 1932, the wholesale price of butter in the state of Washington was twenty-two cents a pound, and the retail price twenty-four to twenty-six cents a pound; that the import price of Nucoa to complainant on the 13th day of September, 1932, was twelve cents a pound; and that complainant, if it could sell said Nucoa free of said tax, would sell to retail dealers in the state of Washington at fourteen cents a pound, and said retail dealers in the state of Washington would in turn sell said product to the general public at seventeen cents a pound. That in the interval between the filing of the amended bill and September 13, 1932, there was a gradual and continuous decline of both said butter and oleomargarine prices down to said September 13, 1932, in the same general proportion as that above set forth.

[fol. 87] XI

That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within, the state of Washington of said product; and had and still has, within the said state, a large amount of property devoted to said business; that the business of complainant in the

state of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9, 1931, had a regularly established business in which it imported from the state of California and sold in the state of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and the annual net profits of said business in said state during said period exceeded the sum of $20,000.00 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9, 1931, said importation and sales of oleomargarine by the complainant in the state of Washington were as follows:

Year	Pounds Sold.
1929	2,522,762
1930	2,116,056
1931 up to March 9	475,815

That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same, has not imported from the state of California and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within [fol. 88] the terms of said act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the state of Washington for use and sale in the state of Washington, or imported into or sold in the state of Washington any such oleomargarine.

XII

That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the state of Washington under the provisions of said act for the reason that, since said date, no sales of oleomargarine subject to tax under said act have been made; that since the effective date of said act no applications have been made to the collector of internal revenue of the United States in the state of Washington for wholesale or retail licenses under the federal

statutes to sell oleomargarine in the state of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the state of Washington under said federal statutes since such date, nor has the government of the United States derived any revenue from sales of oleomargarine within the state of Washington since such date.

XIII

That for a long time prior to and up to the time said act imposing a tax of fifteen cents per pound became effective complainant imported into the state of Washington said Nucoa at a cost of seventeen cents per pound, and sold said product to retail dealers in the state of Washington at twenty cents per pound, who in turn sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said act up to the time of filing the amended bill the price per pound at which complainant could import said product and, if not taxed under said act, could sell the same to retail dealers, [fol. 89] and the price per pound at which retail dealers in the state of Washington could resell to the general public has remained the same, and that since the date of filing the amended bill down to September 13, 1932, there was a gradual decline in said respective oleomargarine prices to the extent hereinbefore set forth. That these facts apply without substantial variations to all other persons, firms and corporations engaged in manufacturing, importing and/or selling oleomargarine within the state of Washinton.

XIV

That defendants and their respective predecessors in office have at all times since the effective date of chapter 23, Laws of 1931, threatened and continue to threaten to enforce against complainant and all others similarly situated a tax of fifteen cents per pound on all oleomargarine sold by them within the state of Washington. That the defendants state that it is their intention to enforce said chapter 23 of the Laws of 1931 against all sales of oleomargarine that may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

XV

That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and join in the expense of this proceeding. That the complainant has no adequate remedy at law.

XVI

That dairying is one of the basic industries of the state of Washington; that the state comprises 66,811 square miles of land upon which there are 40,800 dairy farms comprising in excess of 250,000 acres of improved farm land besides [fol. 90] innumerable lesser farms devoted partially to the production of butter and other dairy products.

XVII

That according to the official report of the state department of agriculture for the calendar year 1930, there were in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,794,384,000	pounds
Creamery butter	32,925,707	pounds
Ice-cream	3,598,466	gallons
Cheese	8,264,332	pounds
Evaporated and condensed milk	54,545,568	pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$1,514,000.00	

XVIII

That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,403	pounds
Creamery butter	29,804,070	pounds
Ice-cream	5,425,523	gallons
Cheese	6,788,283	pounds
Evaporated and condensed milk	41,610,900	pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$3,203,086.85	

XIX

That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties.

XX

That the real estate taxes paid by the farmers of the state of Washington on properties used to raise forage and feed for their cows are $8,486,482, and on personal property $2,402,272.

[fol. 91] XXI

That the complainant, after March 9, 1931, could not have sold any oleomargarine in the state of Washington except at a loss, because the said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine higher than that of butter. There is no proof that the tax does not give a reasonable profit on cost of manufacture or on capital invested. (See 2 Fed. Sup. 417 at 422.)

And from the foregoing Findings of Fact the court makes the following

Conclusions of Law

I

That the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, either (a) in that it levies a tax confiscatory in amount and has destroyed complainant's business, or (b) in that it is a tax for a private purpose.

II

The said enactment of the State of Washington does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, either (a) in that it actually suppresses and destroys a legitimate business by means of a law not applicable to or equally operative upon other legitimate businesses, or (b) in that it imposes a tax in aid of a private industry.

III

The said enactment of the State of Washington does not violate the commerce clause of the Federal Constitution.

[fol. 92] IV

The said enactment of the State of Washington does not constitute unlawful interference with the federal taxing power.

Wherefore, defendants are entitled to a final decree dismissing the above entitled cause.

Complainant severally excepts to Conclusions of Law numbered I, II, III and IV, upon the ground that each of said conclusions is contrary to law and unwarranted by the Findings of Fact, and each of said exceptions to said conclusions is by the court hereby allowed.

Done by the court this 28th day of August, 1933.

Curtis D. Wilbur, Circuit Judge; Jeremiah Neterer, District Judge. (Judge Cushman is on vacation, out of the district and difficult to reach.)

Approved as to form:

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys and Solicitors for Defendant. Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for Complainant.

[File endorsement omitted.]

[fol. 93] In United States District Court for the Western District of Washington, Southern Division

In Equity. No. 458

A. Magnano Company, a Corporation, Complainant,

vs.

G. W. Hamilton, as Attorney General of the State of Washington, Walter J. Robinson, as Director of Agriculture of the State of Washington, and Clarence D. Martin, as Governor of the State of Washington, Defendants

Final Decree—Filed Aug. 29, 1933

The above-entitled cause came on for final hearing on September 13, 1932, before this court, consisting of three

judges, pursuant to Section 266 of the Judicial Code of the United States, to-wit, the Honorable Curtis D. Wilbur, Circuit Judge for the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed by this court as follows:

That the above-entitled cause be dismissed and that the defendants recover of the complainant their costs and disbursements herein.

Complainant's exception to the foregoing decree is hereby allowed.

Done by the court this 28th day of August, 1933.

Curtis D. Wilbur, Circuit Judge; Jeremiah Neterer, Dist. Judge.

Approved as to form:

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys for Defendants. Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Oct. 21, 1933

To the Honorable Judges of the District Court of the United States for the Western District of Washington:

A. Magnano Company, a corporation, your petitioner, respectfully shows:

I

Your petitioner is the complainant in the above entitled cause.

II

On the 18th day of September, 1931, your petitioner filed an amended bill of complaint in the District Court of the United States for the Western District of Washington, asking for an interlocutory and permanent injunction against the predecessors in office of the defendants to restrain them from enforcing, as against the petitioner, Chapter 23 of the Laws of 1931 of the State of Washington, upon the ground that the said statutes of the State of Washington are violative of the Constitution of the United States. A copy of the said statutes of the State of Washington was attached to the said amended bill of complaint as Exhibit "A". The grounds upon which the said statutes [fol. 95] are claimed to be invalid by this petitioner are more particularly set forth in paragraph XVIII of said amended bill of complaint.

III

At the time of the filing of the amended bill of complaint your petitioner renewed its application for an interlocutory injunction, and thereupon, pursuant to Section 266 of the Judicial Code of the United States, the said application came on for hearing before a statutory court of three judges, to-wit, the Honorable Curtis D. Wilbur, Circuit Judge for the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington, duly convened in accordance with the provisions of said section. At the time of the hearing upon complainant's application for an interlocutory injunction, the defendants appeared in the above-entitled court and filed an answer containing a motion to dismiss the said amended bill of complaint, upon the ground that the said amended bill of complaint did not state facts sufficient to constitute a cause of action. The said three-judge court, after hearing complainant's application for an interlocutory injunction and the said motion to dismiss, denied the defendants' motion to dismiss and also denied the complainant's application for an interlocutory injunction, and determined that the whole matter should be disposed of at final hearing on the merits. The opinion of the statutory court is reported in 2 Fed. Supp. 414.

IV

Thereafter, to-wit, on the 17th day of September, 1932, the above entitled cause came on for final hearing, before this court, consisting of said three judges, pursuant to Sec- [fol. 96] tion 266 of the Judicial Code of the United States, upon a stipulation of facts agreed to by the parties, supplemented by brief oral testimony. At the conclusion of said final hearing the said statutory court took the said cause under advisement, and on or about the 17th day of January, 1933, rendered its opinion, to the effect that the above entitled cause should be dismissed. The opinion is reported in 2 Fed. Supp. 417. Thereafter, owing to a change in the incumbency in office of the defendants, and upon appropriate showing and written consent of their successors, their said successors above named were, by appropriate order, substituted as parties defendant. Thereafter, to-wit, on the 28th day of August, 1933, the above-entitled court, pursuant to Equity Rule 70½, entered herein its findings of fact and conclusions of law and its final decree, dismissing the above entitled cause and granting the defendants their costs and disbursements herein.

V

The final decree is greatly to the prejudice and injury of your petitioner and is erroneous and inequitable.

VI

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith, pursuant to Rule 9 of the Rules of the United States Supreme Court; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays for the allowance of [fol. 97] an appeal in said cause to the Supreme Court of the United States, agreeably to the statutes and rules of the court in such cases made and provided, and that a

proper order touching the security required of the petitioner be made.

Dated: October 21, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for the Petitioner. 660 Colman Building, Seattle, Washington.

[File endorsement omitted.]

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Oct. 21, 1933

The appellant assigns the following errors in the record and proceedings in this case:

I

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that it levies a tax confiscatory in amount and has destroyed complainant's business.

II

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in [fol. 99] that under the due process clause of the Fourteenth Amendment taxes may be levied only for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into, and sale within the State of Washington of

oleomargarine in aid of the dairy industry, a purely private business.

III

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that said enactment of the State of Washington violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, either (a) in that it actually suppresses and destroys a legitimate business by means of a law not applicable to or equally operative upon other legitimate businesses, or (b) in that it imposes a tax in aid of a private industry.

IV

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the said enactment of the State of Washington violates the commerce clause of the Constitution of the United States (Paragraph 3 of Section 8 of Article I), in that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state.

V

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the said enactment of the State of [fols. 100–119] Washington constitutes an unconstitutional interference with the taxing power of the Government of the United States granted by Article I, Section 8, of the Constitution of the United States, in that said act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises, and has, without producing any revenue whatsoever for the State of Washington, completely destroyed, as found in the Findings of Fact, all federal revenue from the sale of oleomargarine within the State of Washington, under applicable acts of Congress.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the said decree of the Dis-

trict Court of the United States for the Western District of Washington dated August 28, 1933, in the above entitled cause, be reversed and a decree rendered in favor of this complainant.

Dated this 21st day of October, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for Complainant and Appellant, 660 Colman Building, Seattle, Washington.

[File endorsement omitted.]

[fol. 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed Oct. 21, 1933

The petition of A. Magnano Company, a corporation, the complainant in the above-entitled action, for an appeal in the above-entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States for the Western District of Washington, having been presented herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the record in this cause having been considered;

It is hereby ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Western District of Washington made and entered in this cause on the 28th day of August, 1933, and that the Clerk of the said District Court of the United States for the Western District of Washington, Southern Division, shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the court, a true copy of the material parts [fol. 121] of the record herein, which shall be designated by a præcipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a good and sufficient cost bond in the sum of two hundred fifty and no/100 Dollars ($250.00), conditioned as required by law.

Done at Tacoma this 21st day of October, 1933.

Edward E. Cushman, District Judge.

[File endorsement omitted.]

[fols. 122–125] Bond on appeal for $250.00, approved and filed Oct. 21, 1933, omitted in printing.

[fol. 126] [File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

PROOF OF SERVICE OF PAPERS UNDER RULE 12, UNITED STATES SUPREME COURT RULES—Filed Oct. 25, 1933

Service, pursuant to Rule 12, paragraph 2, Rules of the Supreme Court of the United States, is hereby acknowledged of copies of the following papers in the above entitled cause:

1. Petition for Appeal.
2. Order Allowing Appeal.
3. Assignment of Errors.
4. Statement as to Jurisdiction.

Dated this 25th day of October, 1933.

G. W. Hamilton, Attorney General of the State of Washington; E. P. Donnelly, Assistant Attorney General, Attorneys for Appellees. Address: Temple of Justice, Olympia, Washington.

[fol. 127] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION FOR TRANSCRIPT ON APPEAL—Filed Oct. 25, 1933

It is hereby stipulated by the parties hereto, by their respective attorneys and solicitors undersigned, that the clerk of the above-entitled court shall prepare a transcript of the record on appeal of the above entitled cause to the

Supreme Court of the United States, which shall constitute the transcript of record on said appeal, including therein the following papers and documents:

1. Amended bill of complaint.
2. Application for interlocutory injunction and convening of statutory three-judge court, based upon verified amended bill of complaint.
3. Notice to defendants of application for interlocutory injunction.
4. Defendants' answer to amended bill of complaint.
5. Order convening statutory three-judge court.
6. Notice to defendants of order convening statutory three-judge court.
7. Opinion of three-judge court on motion to dismiss and on application for interlocutory injunction.
8. Stipulation of facts.
9. Statement of the evidence.

[fol. 128] 10. Opinion of three-judge court on the merits after final hearing.

11. Findings of fact and conclusions of law.
12. Final decree.
13. Petition for appeal to the Supreme Court of the United States.
14. Assignment of errors.
15. Statement as to jurisdiction of the Supreme Court of the United States.
16. Order allowing appeal.
17. Cost bond.
18. Citation.
19. Statement directing attention to Rule 12, United States Supreme Court Rules.
20. Proof of service of papers required by Rule 12, United States Supreme Court Rules.
21. Stipulation for transcript on appeal.
22. Clerk's certificate.

Dated: October 25th, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for Complainant and Appellant. G. W. Hamilton, Attorney General of the State of Washington; E. P. Donnelly, Assistant Attorney General, Attorneys and Solicitors for Defendants and Appellees.

[File endorsement omitted.]

[fol. 129] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 130 & 131] Citation in usual form, showing service on G. W. Hamilton, filed Oct. 25, 1933, omitted in printing.

[fol. 132] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—(PURSUANT TO RULE 13 (9))—Filed Nov. 17, 1933

[fol. 133] Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Seattle, Washington, November 14, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Appellant.

[fol. 134] [File endorsement omitted.]

Endorsed on cover: File No. 38,192. W. Washington, D. C. U. S. Term No. 589. A. Magnano Company, appellant, vs. G. W. Hamilton, as Attorney General of the State of Washington, et al., etc. Filed November 15, 1933. File No. 589 O. T. 1933.

(4479-C)